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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

A. ROBERT KLEINER, ROSIE BOARD, FRANCIS BROUILLETTE and ERMA LURVEY, Democratic Members of the Michigan Commission on Legislative Appointment

Appellants,

v.

RICHARD SANDERSON, CLARE DANIELS, JOHN PAYANT, and LOU ANN TAYLOR, Republican Members of the Michigan Commission on Legislative Appointment

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPENDIX

THEODORE SACHS
Counsel for Appellants
1000 Farmer
Detroit, MI 48226
(313) 965-3464

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OPINION OF MICHIGAN SUPREME COURT

(March 25. 1982)

In re APPORTIONMENT OF STATE LEGISLATURE-1982

413 Mich 96

Docket No. 68777. Argued March 5, 1982 (Calendar No. 1).-Decided March 25, 1982.

Per Curiam. The Constitution of 1963, art 4, §§2-6, provides that, following the decennial census, the Commission on Legislative Apportionment[1] shall establish House and Senate dis-

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[1]The commission, consisting of eight persons, four selected by the state organization of each of the two major political parties, is empowered to "district and apportion the senate and house of representatives according to the provisions of this constitution". Const 1963, art 4, §6.

See fn 2 for complete text of §6.

tricts in accordance with rules there prescribed for districting and apportionment. If a majority of the commission cannot agree upon a reapportionment plan, then, upon submission of plans to this Court by members of the commission, this Court shall determine which plan complies most accurately with "the constitutional requirements" and order its adoption.[2]

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[2]If there is a failure to agree on a plan, each member of the commission may submit a proposed plan to this Court.

Within 60 days after final publication of a plan, on application of any elector, this Court, in the exercise of original jurisdiction, may direct the commission to perform its duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action "if it fails to comply with the requirements of this consititution".

The following is the complete text of art 4, §6.

"Commission on legislative apportionment.

"Sec. 6. A commission on legislative apportionment is hereby established consisting of eight electors, four of whom shall be selected by the state organization of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment. If a candidate for governor of a third political party has received at such election more than 25 percent of such gubernatorial vote, the commission shall consist of 12 members, four of whom shall be selected by the state organization of the third political party. One resident of each of the following four regions shall be selected by each political party organization: (1) the upper peninsula; (2) the northern part of the lower peninsula, north of a line drawn along the northern boundaries of the counties of Bay, Midland, Isabella, Mecosta, Newaygo and Oceana; (3) southwestern Michigan, those counties south of region (2) and west of a line drawn along the western boundaries of the counties of Bay, Saginaw, Shiawassee, Ingham, Jackson and Hillsdale; (4) southeastern Michigan, the remaining counties of the state.

"Eligibility to membership.

"No officers or employees of the federal, state or local governments,

excepting notaries public and members of the armed forces reserve, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective.

"Appointment, term, vacancies.

"The commission shall be appointed immediately after the adoption of this constitution and whenever apportionment or districting of the legislature is required by the provisions of this constitution. Members of the commission shall hold office until each appointment or districting plan becomes effective. Vacancies shall be filled in the same manner as for original appointment.

"Officers, rules of procedure, compensation, appropriation.

"The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all necessary technical services. The commission shall elect its own chairman, shall make its own rules of procedure, and shall receive compensation provided by law. The legislature shall appropriate funds to enable the commission to carry out its activities.

"Call to convene; apportionment; public hearings.

"Within 30 days after the adoption of this constitution, and after the official total population count of each federal decennial census of the state and its political subdivisions is available, the secretary of state shall issue a call convening the commission not less than 30 nor more than 45 days thereafter. The commission shall complete its work within 180 days after all necessary census information is available. The commission shall proceed to district and apportion the senate and house of respresentatives according to the provisions of this constitution. All final decisions shall require the concurrence of a majority of the members of the commission. The commission shall hold public hearings as may be provided by law.

"Apportionment plan, publication; record of proceedings.

"Each final apportionment and districting plan shall be published as provided by law within 30 days from the date of its adoption and shall become law 60 days after publication. The secretary of state shall keep a public record of all the proceedings of the commission and shall be responsible for the publication and distribution of each plan.

"Disagreement of commission; submission of plans to supreme court.

"If a majority of the commission

The rules prescribed by the 1963 Constitution for districting and apportioning the Legislature are based on weighted land area/population formulae.[3] Shortly after the adoption of

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cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section.

"Jurisdiction of supreme court on elector's application.

"Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution."

[3]The 1963 Constitution provides that both the Senate and the House are to be elected from single-member districts.

THE SENATE

In districting the state for the purpose of electing senators, each county is assigned apportionment factors which are based 20% on land area and 80% on population.

In the less populous counties, those with less than 13 apportionment factors, the counties are to be arranged into senatorial districts that are compact, convenient, and contiguous by land, as rectangular in shape as possible, and having as nearly as possible 13 apportionment factors, but in no event less than 10 or more than 16. Insofar as possible, "existing senatorial districts at the time of reapportionment shall not be altered unless there is a failure to comply with the above standards".

In counties with 13 or more apportionment factors (entitled to one or more senators), one senator is assigned to each county, and the balance of those assigned to those counties as a class are assigned among them in accordance with the "method of equal proportions".

In counties which are assigned two or more senators, the population of the senatorial districts "shall be as nearly equal as possible but shall not be less than 75 percent nor more than 125 percent" of the ideal district, and each district "shall follow incorporated city or township boundary lines

to the extent possible and shall be compact, contiguous, and as nearly uniform in shape as possible".

The complete text of §2, concerning the districting and apportionment of the Senate, is as follows:

"Senators, number, term.

"Sec. 2. The Senate shall consist of 38 members to be elected from single member districts at the same election as the governor for four-year terms concurrent with the term of office of the governor.

"Senatorial districts, apportionment factors.

"In districting the state for the purpose of electing senators after the official publication of the total population count of each federal decennial census, each county shall be assigned apportionment factors equal to the sum of its percentage of the state's population as shown by the last regular federal decennial census computed to the nearest one-one hundredth of one percent multiplied by four and its percentage of the state's land area computed to the nearest one-one hundredth of one percent.

"Apportionment rules.

"In arranging the state into senatorial districts, the apportionment commission shall be governed by the following rules:

"(1) Counties with 13 or more apportionment factors shall be entitled as a class to senators in the proportion that the total apportionment factors of such counties bear to the total apportionment factors of the state computed to the nearest whole number. After each such county has been allocated one senator, the remaining senators to which this class of counties is entitled shall be distributed among such counties by the method of equal proportions applied to the apportionment factors.

"(2) Counties having less than 13 apportionment factors shall be entitled as a class to senators in the proportion that the total apportionment factors of such counties bear to the total apportionment factors of the state computed to the nearest whole number. Such counties shall thereafter be arranged into senatorial districts that are compact, convenient, and contiguous by land, as rectangular in shape as possible, and having as nearly as possible 13 apportionment factors, but in no event less than 10 or more than 16. Insofar as possible, existing senatorial districts at the time of reapportionment shall not be altered unless there is a failure to comply with the above standards.

"(3) Counties entitled to two or more senators shall be divided into single member districts. The population of such districts shall be as nearly equal as possible but shall not be

less than 75 percent nor more than 125 percent of a number determined by dividing the population of the county by the number of senators to which it is entitled. Each district shall follow incorporated city or township boundary lines to the extent possible and shall be compact, contiguous, and as nearly uniform in shape as possible."

THE HOUSE

In districting the state for the purpose of electing members of the House of Representatives, "districts shall consist of compact and convenient territory contiguous by land".

A formula, also taking into account land area, provides for the assignment of representatives among the counties. Each county having a population of not less than 0.7% of the population of the state constitutes a separate representative area, and the balance of the representatives are assigned in accordance with the "method of equal proportions". Counties entitled to more than one representative shall be divided into districts with a population "as nearly as equal as possible" containing not less than 75% nor more than 125% of the ideal population and such districts "shall follow city and township boundaries where applicable and shall be composed of compact and contiguous territory as nealy square in shape as possible".

A representative area consisting

of more than one county, entitled to more than one representative, is to be divided into single-member districts "as equal as possible in population, adhering to county lines".

The complete text of §3, concerning the districting and apportionment of the House, is as follows:

"Representatives, number, term; contiguity of districts.

"Sec. 3. The house of representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population as provided in this article. The districts shall consist of compact and convenient territory contiguous by land.

"Representative areas, single and multiple county.

"Each county which has a population of not less than seven-tenths of one percent of the population of the state shall constitute a separate representative area. Each county having less than seven-tenths of one percent of the population of the state shall be combined with another county or counties to form a representative area of not less than seven-tenths of one percent of the population of the state. Any county which is isolated under the initial allocation as provided in this section shall be joined with that con-

tiguous representative area having the smallest percentage of the state's population. Each such representative area shall be entitled initially to one representative.

"Apportionment of representatives to areas.

"After the assignment of one representative to each of the representative areas, the remaining house seats shall be apportioned among the representative areas on the basis of population by the method of equal proportions.

"Districting of single county area entitled to 2 or more representatives.

"Any county comprising a representative area entitled to two or more representatives shall be divided into single member representative districts as follows:

"(1) The population of such districts shall be as nearly equal as possible but shall not be less than 75 percent nor more than 125 percent of a number determined by dividing the population of the representative area by the number of representatives to which it is entitled.

"(2) Such single member districts shall follow city and township boundaries where applicable and shall be composed of compact and contiguous territory as nearly square in shape as possible.

the 1963 Constitution and after the decision, on June 15, 1964, of the United States Supreme Court in Reynolds v Sims, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964), those formulae were held to be violative of the Equal Protection Clause of the Constitution of the United States.[4]

"Districting of multiple county representative areas.

"Any representative area consisting of more than one county, entitled to more than one representative, shall be divided into single member districts as equal as possible in population, adhering to county lines."

Art 4, §4 concerns "annexation or merger with a city" and §5 concerns "island areas, contiguity".

[4]In Marshall v Hare, 227 F Supp 989 (ED Mich, 1964), a three-judge court, upon consideration of arguments based on Baker v. Carr, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962), held that the weighted land area/population formulae were not violative of the Equal Protection Clause.

The Commission on Legislative Apportionment nevertheless continued to function. After Reynolds v Sims, on June 22, 1964, and, following the 1970 census, again on May 4, 1972, this Court chose between plans offered by members of the commission and declared

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After Reynolds v Sims, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964), was decided, the United States Supreme Court, on June 22, 1964, reversed by brief order on the authority of Reynolds v Sims and said:

"The case is remanded for further proceedings consistent with the views stated in our opinions in Reynolds v Sims and in the other cases relating to state legislative apportionment decided along with Reynolds."

Justice Clark and Stewart, who concurred in Reynolds on separate grounds, stated that they "would affirm the judgment because the Michigan system of legislative apportionment is clearly a rational one and clearly does not frustrate effective majority rule." Justice Harlan dissented for the reasons stated in his dissenting opinion in Reynolds v Sims. Marshall v Hare, 378 US 561; 84 S Ct 1912; 12 L Ed 2d 1036 (1964).

that the plan so chosen most accurately complied with "the constitutional requirements" and directed its adoption by the commission.[5]

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[5]Before Reynolds v Sims, this Court, on May 26, 1964, ordered the adoption of a plan based upon the presumed validity of the weighted land area/population formula. See In re Apportionment of State Legislature-1964, 372 Mich 418, 480; 126 NW2d 731; 127 NW2d 862; 128 NW2d 350 (1964). After Reynolds v Sims, this Court vacated its order of May 26, 1964, and ordered the Commission on Legislative Apportionment to adopt a plan for districting and apportioning the Senate and House of Representatives in accordance with Reynolds v Sims. In re Apportionment of State Legislature-1964, 373 Mich 247; 128 NW2d 721 (1964). The commission failed to agree on a plan, and this Court entered an order directing the commission to adopt the Austin-Kleiner plan, the only plan submitted that was not based on the weighted land area/population formula. In re Apportionment of State Legislature-1964, 373 Mich 250; 128 NW2d 722 (1964). A challenge by an elector pursuant to the eighth paragraph of Const 1963, art 4, §6 was remanded to the commission. In re Apportionment of State Legislature-1965, 376 Mich 410, 137 NW2d 495; 138 NW2d 16 (1965). The

However, fundamental questions concerning the commission's and this Court's roles in the apportionment process have yet to be addressed by this

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commission was unable to agree, and the paragraph eight challenge was dismissed pursuant to an order dated April 6, 1966, because a majority of the Court could not agree on other action. In re Apportionment of State Legislature-1965-1966, 377 Mich 396, 474; 140 NW2d 436 (1966).

When legislative apportionment was again before this Court, in 1972, after the Commission on Legislative Apportionment failed to agree on a plan, it was not claimed that the 1963 Constitution's apportionment formulae had been validated by subsequent decisions of the United States Supreme Court. See In re Apportionment of State Legislature-1972, 387 Mich 442; 197 NW2d 249 (1972). Nor has any such claim been made in the instant proceedings.

We note that the percentages of divergence set forth in the tables appended to the three-judge opinion in Marshall v Hare, supra, indicate a disparity of population considerably in excess of the margins upheld by the United States Supreme Court in subsequent decisions. See fn 17, infra.

Court. One Justice in 1964,[6] another justice in 1972,[7] expressed the view that the commission and this court's authority is limited to districting

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[6] In re Apportionment of State Legislature-1964, 373 Mich 250, 257; 128 NW2d 722 (1964) (Souris J.)

[7] In re Apportionment of State Legislature-1972, 387 Mich 442, 492; 197 NW2d 249 (1972) (T.G. Kavanagh, J.).

A petiton for rehearing, filed in 1973, was denied in an unpublished order on September 26, 1973; an amended order, dated October 2, 1973, reads as follows:

"On order of the Court, the motions by petitioners Paul G. Goebel, Sr., Ralph E. Huhtala and Anthony C. Licata for relief from final judgment and to designate parties to proceedings are considered, and the same are hereby denied.

"Justice T. G. Kavanagh would grant review for the reasons set forth in his dissenting opinion in In re Apportionment of State Legislature-1972, 387 Mich 442 (1972).

"Justice Levin would grant review as he finds persuasive the views expressed by Mr. Justice T. G. Kavanagh in the 1972 Legislative apportionment case and earlier by Mr. Justice Souris in In re Apportionment of State Legisla-

ture-1964, 373 Mich 247, 258 (1964), who concluded that since the provisions in the Michigan Constitution for apportioning and districting both houses of the Michigan Legislature were violative of the United States Constitution, as set forth in the one person-one vote decisions of the United States Supreme Court, the commission on legislative apportionment can no longer 'proceed to district and apportion the senate and house of representatives according to the provisions of this constitution,' (art 4, §6) and, accordingly, the parts not being severable, the apportionment commission fell with the other provisions.

"Justice Coleman would grant review to consider (1) whether the procedure for selecting members of the committee on legislative apportionment as set forth in Const 1963, art 4, §6 places a heavy and discriminatory burden upon minority parties and independent voters, denying these distinct and substantial elements of the voting public an opportunity to participate in a vital phase of the election process, in violation of the United States Constitution; (2) whether Const 1963, art 4, §1 impermissibly delegates legislative power; and (3) whether the commission on legislative apportionment and this Court relied solely or unduly upon the erroneous presumption that apportionment of state legislative districts must reflect mathematical equality of population, thus excluding other constitutional considerations (See

according to the apportionment rules prescribed in art 4, §§2-6, and that since those rules are no longer wholly valid neither the commission nor this Court can properly act at all. While that view was rejected sub silentio when this Court ordered the adoption of plans in 1964 and 1972, no opinion of the Court has addressed or decided the question whether the commission and this Court's authority under art 4, §§2-6 continues despite the partial invalidity, under the United States Constitution, of the apportionment rules

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Const 1963, art 4, §§2,3) and thereby casting doubt upon the constitutional validity of their efforts. See Mahan v Howell, 410 US 315, 93 S Ct 979; 35 L Ed 2d 320 (1973), Gaffney v Cummings, 412 US 735; 93 S Ct 2321; 37 L Ed 2d 298 (1973), and White v Regester, 412 US 755; 93 S Ct 2332; 37 L Ed 2d 314 (1973).

set forth in the 1963 Constitution.[8] Nor has the Court definitively considered in any opinion what are "the constitutional requirements".[9]

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[8]Faced with the imminency of the 1964 primary election, it appears that the Court in 1964 simply assumed, without consideration, that the commission's function, the power of its members to submit plans, and this Court's authority, when the members of the commission could not agree, to select the plan which most accurately complies with constitutional requirements continued and that the governing criteria under the Michigan Constitution henceforth would be essentially the one person-one vote standard declared by the United States Supreme Court.

When confronted in 1972 with an impasse between the Democratic and Republican members of the commission, the Court did not reconsider those assumptions. Two of the four justices who signed the 1972 opinion of the Court comprised part of the 1964 majority which had ordered the adoption of the 1964 apportionment plan and thus had, in a sense, already committed themselves on those issues.

[9]See Part II, infra.

The Court's actions in 1964 and 1972, taken without addressing or definitively considering fundamental questions, are not precedentially binding for it is well-established in this state that "[a] point thus assumed without consideration is of course not decided". Allen v Duffie, 43 Mich 1, 11; 4 NW 427 (1880); People v Aaron, 409 Mich 672, 722; 299 NW2d 304 (1980).

Upon receipt, on February 12, 1982, of advice that the commission had failed to agree, upon a plan, and the submission by members of the commission to this Court of plans, this Court entered an order establishing a procedure for the filing of plans and requesting briefs and oral argument on the questions (1) whether the authority of the commission and this Court contin-

ues despite the invalidity under the United States Constitution of some of the apportionment rules, and (2) if the authority of the commission and this Court continues, what standards govern districting and apportionment.[10]

We summarize our conclusions as follows:

1. It is this Court's duty under Const 1963, art 6, §1, providing for

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[10]The Court's order of February 24, 1982, establishing a procedure for the filing of further plans and scheduling briefing thereon, directed that briefs be separately and earlier filed on the following questions:

"a. Do the authority and responsibility of the apportionment commission and this Court survive invalidation of the weighted land/population formula, and

"b. If the commission's and this Court's authority and responsibility are not thereby superseded, what are the 'constitutional requirements' within the meaning of Const 1963, art 4, §6?"

the exercise of the judicial power, to determine what are the requirements of this constitution and to define the meaning of those requirements in specific applications.

2. The term "constitutional requirements" means the provisions of art 4, §§2-6 concerning the number and terms of office of senators and representatives, establishing the commission, providing for the decennial districting and apportionment of the Legislature in accordance with apportionment rules there stated and declaring this Court's function with regard thereto which are not violative of the Equal Protection Clause of the United States Constitution.

While the Equal Protection Clause of the United States Constitution, as

elucidated in Reynolds v Sims, supra, requires equality of population in forming election districts, the term "constitutional requirements", as used in art 4, §§ 2-6, does not refer to the Equal Protection Clause of the United States Constitution, the Equal Protection Clause of the Michigan Constitution (Const 1963, art 1, §2), or any other provision of the Michigan Constitution.

3. The provisions of the second and third paragraphs of art 4, §2 and of the second paragraph of art 4, §3, establishing weighted land area/population formulae taking into account land area as well as population (thereby apportioning to less populous areas a larger number of senators and representatives than would be apportioned there-

to based on population alone), are invalid under the Equal Protection Clause of the United States Constitution as elucidated in Reynolds v Sims, and subsequent decisions of the United States Supreme Court.

4. Standing alone and in the abstract, requirements that county, city and township lines be observed in districting and apportionment, and that election districts be compact, are not violative of the Equal Protection Clause of the United States Constitution as long as the resulting districts do not exceed the "range of allowable divergence" from the federal goal of equality of population.

5. It appears from Mahan v Howell, 410 US 315; 93 S Ct 979; 35 L Ed 2d 320 (1973), that the range of allowable

divergence is at least 16.4%.

6. The weighted land area/population formulae, invalidated by Reynolds v Sims, supra, and the remaining apportionment rules of art 4, §§ 2-6, are inextricably interdependent and therefore are not severable. Similarly, the function of the commission, which depends on those rules, and indeed the commission itself, are not severable from the invalidated rules.[11]

7. It is this Court's responsibility to provide for the continuity of

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[11]Counsel for both parties have cited Dodge v Austin (ED Mich, 1975, Docket No. 4-70235), aff'd 423 US 886; 96 S Ct 181; 45 L Ed 2d 119 (1975), in support of the proposition that the Commission on Legislative Apportionment survived the invalidation of the weighted land area/population formulae.

In Dodge v Austin, a three-judge federal court ruled that this Court had recognized the continuing validity of the commission and concluded there-

government by assuring that the people will be provided the opportunity to elect a lawfully apportioned Legislature in the 1982 election.

8. The Court directs the drawing of election districts in a manner compliant with federal constitutional requirements consistent with the constitu-

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from that the commission's existence was severable from the invalidated formulae. That question had not been decided by this Court.

The question before this Court is whether, as a matter of Michigan constitutional law, the invalidity of the weighted formulae makes invalid the language establishing the commission and this Court's role in regard thereto. All that the federal court could properly hold was that the concept of this apportionment commission was not violative of the federal constitution. The question whether provisions of the Michigan Constitution are severable cannot be foreclosed by a decision of a federal court, even though affirmed by the United States Supreme Court, because the Michigan Supreme Court has the ultimate responsibility for determining a question of state law.

tional history of this state, and the resulting redistricting and apportionment plan shall stand until the Legislature and the Governor or the people provide by law an alternative plan.

I

The two questions posed to the parties by this Court and stated above-severability and standards-are interrelated. In deciding whether the commission and this Court's authority under art 4, §§ 2-6 survive the partial invalidity, under the United States Constitution, of the districting and apportionment rules, the Court is obliged to examine the function of the commission in the wake of Reynolds v Sims. This in turn requires that the Court determine the standards by which

the commission was governed before and after Reynolds v Sims.

II

The 1972 opinion of this Court declared, based on its understanding of Reynolds v Sims and subsequent decisions of the United States Supreme Court, that the apportionment plan with the least population differentials from the ideal was the one which most complied with the "constitutional requirements" of the 1963 Constitution.

The Court's perception of federal constitutional standards would shortly prove to be incorrect."[12] The following year, in Mahan v Howell, 410 US 315;

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[12]The following is a summary of decisions of the United States Supreme Court on apportionment:

In Baker v Carr, supra, the United States Supreme Court considered a claim that the Tennessee legislature was unconstitutionally malapportioned, It had therefore been thought that such a claim involved a "political question" and not justiciable. The Court distinguished prior "political question" cases as involving claims arising under the provision of the United States Constitution guaranteeing every state a republican form of government. Because this action was brought under the Equal Protection Clause, the Court held that policy considerations pertinent to the Guaranty Clause were not involved and remanded the cause for further proceedings in the application of equal protection standards.

After the adoption by the people of the 1963 Constitution, the United States Supreme Court held that Georgia's congressional districting was unconstitutional because it was violative of the provision of the United States Constitution requiring that the members of the House of Representatives be chosen "by the people". The Court ruled that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's". Wesberry v Sanders, 376 US 1, 7-8; 84 S Ct 526; 11 L Ed 2d 481 (1964).

In the landmark case of Reynolds v Sims, 377 US 533, 84 S Ct 1362; 12 L Ed 2d 506 (1964), the United States Supreme Court, on June 15, 1964, invalidated Alabama's legislative apportion-

ment. The Court held that the Equal Protection Clause requires that both houses of a bicameral state legislature be apportioned on a population basis, although some deviation would be permitted if based on legitimate considerations incident to the effectuation of a rational state policy.

Five years later, in invalidating the Missouri congressional apportionment, the Court declared that "the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v Sims". Kirkpatrick v Preisler, 394 US 526, 530-531; 89 S Ct 1225; 22 L Ed 2d 519(1969).

In Mahan v Howell, 410 US 315; 93 S Ct 979; 35 L Ed 2d 320 (1973), the Court, in upholding Virginia's reapportionment plan, drew a distinction between congressional and state legislative apportionment. While population variance is the sole criterion in congressional reapportionment, state legislative plans are allowed greater flexibility. The constitutional tests are different partly because judicial review is based on different sections of the constitution. Minor deviations from precise equality may be justified when caused by the pursuit of a rational state policy.

A few months later in Gaffney v Cummings, 412 US 735; 93 S Ct 2321; 37 L Ed 2d 298 (1973), the Court held that the deviations in Connecticut's

93 S Ct 979; 35 L Ed 2d 320 (1973), the United States Supreme Court ruled that in state legislative apportionment. the state Legislature, or other body entrusted with the function of reapportionment, may within limits—the Court approved a maximum deviation of 16.4%—depart from the goal of population equality in order to achieve other rational, legitimate state goals such as preserving the integrity of political subdivisions of the state.

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legislative apportionment were so small as not to require any justification at all. There is a three-tiered review of state legislative apportionment, the Court said. Some plans have population variances so small as to require no justification whatsoever (Gaffney), some plans have population variances large enough to require justification (Mahan), and some plans have population variances so large that they cannot be justified (Reynolds).

A

The 1972 opinion of the Court declared that "[t]he controlling criterion for judgment in legislative apportionment controversies, involving bicameral state legislatures, under the equal protection clauses of the Federal and state Constitutions is equality of population as nearly as practicable". In re Apportionement of Legislature-1982, 387 Mich 442, 453; 197 NW2d 249 (1972). The opinion characterized the statement in Reynolds v Sims, supra, that a state may legitimately desire to maintain the integrity of political subdivisions as dictum. Instead, it relied on the stringent equality of population criterion set forth in Kirkpatrick v Preisler, 394 US 526; 89 S Ct 1225; 22 L Ed 2d 519 (1969), where

the Court rejected avoidance of fragmenting political subdivisions as a legitimate reason for departing from equality in congressional districts.

Although the United States Supreme Court, in Reynolds, had noted a difference between congressional and state legislative districting, the 1972 opinion of this Court declined to distinguish Kirkpatrick on the ground, stating that "[p]rudence would counsel avoidance" of the problem that might be presented by attempting to confine Kirkpatrick to congressional districting. "In end analysis, mathematical exactitude re equality of population is the primary and controlling standard. As between competing plans with identical 'equality of population' factors, attention may then be focused upon other considerations such as com-

pactness, shape, etc." In re Apportionment of Legislature-1972, supra, 456.[13] (Emphasis added.)

The refusal to give credence to what the 1972 Court called the dictum of Reynolds v Sims can no longer be justified. In Mahan v Howell the United States Supreme Court said that the constitutionality of a state legislative redistricting plan was "not to be judged by the more stringent standards that Kirkpatrick and Wells v Rockefeller, 394 US 542; 89 S Ct 1234 L Ed 535 (1969)` make applicable to congres-

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[13]The Court also said:

"While it is not possible to develop detailed constitutional requirements, there can be no question of the overriding requirements of 'districts, in both houses of its legislature, as nearly of equal population as is practicable'." In re Apportionment of Legislature-1972, 387 Mich 458.

sional reapportionment, but instead by the equal protection test enunciated in Reynolds v Sims". Referring to its decision in Reynolds, the Court said "we reaffirm its holding that 'the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable * * * [s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.'" Mahan v

Howell, supra, 410 US 324-325.

The Court, in Mahan, 329, held that the maintenance of the integrity of political subdivision lines of local units of government is a rational state policy. It said that while the resulting 16-odd percent maximum deviation "may well approach tolerable limits", the apportionment plan under review had not "sacrificed substantial equality to justifiable deviations".

The reasoning of the 1972 opinion of the Court has thus been dislodged by the United States Supreme Court. Kirkpatrick and the companion case of Wells, which dealt with congressional districting, do not control state legislative districting.

We reject as clearly wrong the argument that this Court, having relied

on its understanding of Kirkpatrick in the 1972 apportionment case, must adhere to that construction in the disposition of this case. The 1972 opinion expressly sought to elucidate and follow the decisions of the United States Supreme Court. Subsequent United States Supreme Court decisions reject the reading adopted by this Court in 1972.

The Equal Protection Clause does not require that the states subordinate altogether a policy of preserving the boundary lines of local units of government to the one person-one vote principle. It can no longer be said that a plan which achieves absolute population equality is necessarily more compliant with the federal constitution than one which takes into account other justi-

fiable state goals. It would be a misconstruction of the Equal Protection Clause for this Court. in the name of Kirkpatrick, to fail to implement a state policy of preserving the boundary lines of local units of government. It is our duty under the Supremacy Clause to fully implement, but not to extend beyond its ambit, the equal Protection Clause.

B

The 1972 opinion failed to distinguish between the requirements of the federal and state constitutions.

We have considered whether the term "constitutional requirements" means (i) provisions of the Michigan Constitution, (ii) only the provisions of art 4, §§ 2-6 of the Michigan Constitution, (iii) provisions of the United

States Constitution, or (iv) provisions of both constitutions.

We conclude that the term "constitutional requirements" means the requirements set forth in art 4, §§ 2-6 of the Michigan Constitution which are not violative of the Equal Protection Clause of the United States Constitution.

The pertinent language of art 4, § 6 is:

"The commission shall proceed to district and apportion the senate and house of representatives according to the provisions of this constitution." (Emphasis supplied.) ¶ 5.

If a majority of the commission cannot agree on a plan, each member may submit a proposed plan to this Court which "shall determine which plan

complies most accurately with the constitutional requirements" (emphasis supplied) and shall direct the commission adopt it. ¶ 7.

Upon application of any elector filed not later than 60 days after final publication of the plan, this Court may review any final plan adopted by the commission "and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution". (Emphasis supplied.) ¶ 8.

The first and third of the foregoing formulations expressly speak of "this" constitution. The commission is charged under the first formulation with districting and apportioning according to the provisions of the Michigan ("this") Constitution. This Court

is obligated under the third formulation to remand to the commission if it fails to comply with the requirements of the Michigan ("this") Constitution. In that light, it was not intended to require this Court, in deciding which plan most accurately complied with "the" constitutional requirements, to consider federal as well as state constitutional requirements and then, on petition of an elector under ¶ 8 of §6, to be obliged to remand to the commission for failure to comply with the Michigan ("this") Constitution's requirements.

The 1963 Constitution did not contemplate that the commission would district and apportion the Legislature in accordance with the requirements of the United States Constitution and the con-

cept that legislative districts should be equal in population. Rather it contemplated substantial population inequality between the districts resulting from apportionment according to the weighted land area/population formulae set forth in art 4, §§ 2-6.

We acknowledge that the 1972 opinion offers support in dictum[14] for the argument that the provisions of art 1, § 2 of the 1963 Constitution are "constitutional requirements" and that thereby there was incorporated, as a constitutional requirement for the purposes of legislative apportionment,

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[14] "The controlling criterion for judgment in legislative apportionment controversies, involving bicameral state legislatures, under the equal protection clauses of the Federal and state Constitutions is equality of population as nearly as practicable." (Emphasis supplied.) In re Apportionment of Legislature—1972, 387 Mich 453.

this state's Equal Protection Clause which elaborates upon the Fourteenth Amendment: "no person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin."

Nothing, however, could be clearer than that art 4, §§ 2-6 provides that senatorial and house districts were not to be equal in population. Land area as well as population was to be taken into consideration. Election district lines were to be drawn along county lines without regard to whether districts more equal in population might be achieved by a different methodology. Considerations of equality and the pres-

ervation of other constitutional rights, recognized and articulated in art 1, § 2 of the 1963 Constitution, were subordinated to the criteria set forth in art 4, §§ 2-6, insofar as apportionment of the Legislature was concerned.

The touchstone of art 4, §§ 2-6 was discrimination; discrimination in favor of less populated areas against the more populated areas. The Legislature was to be apportioned according to the criteria stated in art 4, §§ 2-6 without regard to the goals of achieving equality and the avoidance of discrimination.

In adopting the 1964 and 1972 plans, this Court erred in proceeding on the premise that the least population differential between legislative

districts was the primary "constitutional requirement" within the meaning of art 4, §§ 2-6 of the Michigan Constitution. While that is the core concept of Reynolds v Sims, a concept emanating from the Equal Protection Clause of the United States Constitution, it is not a requirement of art 4, §§ 2-6.

The term "the constitutional requirements" means the requirements of art 4, §§ 2-6 of the 1963 Constitution, which are not violative of the United States Constitution, but does not include the requirements of the United States Constitution.

III

We turn to a consideration of what are the criteria set forth in art 4, §§ 2-6.

A

The apportionment factors and rules which take into account land area as well as population, because they produce divergence in population from the goal of equality exceeding the range of allowable divergence under the United States Constitution, can no longer be regarded as effectual constitutional requirements.

The other criteria set forth in the 1963 Constitution are (i) county, township and city boundary lines, (ii) equality in population within a range of 75-125% of the ideal, (iii) preservation of existing senatorial districts, (iv) contiguity, convenience, compactness, rectangularity, uniformity and squareness.

The basic building blocks of the apportionment rules are the counties. The Senate and the House are to be organized into contiguous, single-member districts drawn on county lines.

House districts, in all counties (those entitled to less than one, to one, or to more than one representative) are to consist of compact and convenient territory contiguous by land.

Senate districts in counties entitled to less than one senator, are to be compact, convenient, and contiguous by land, and as retangular in shape as possible, preserving existing senatorial districts at the time of reapportionment unless to do so would result in the failure to comply with the other standards.

In counties entitled to more than

one senator or representative, House and Senate districts (i) shall be as nearly equal as possible in population, not less than 75% nor more than 125% of the ideal, and (ii) shall follow city and township boundary lines "to the extent possible" (for the Senate) and "where applicable" (for the House), and (iii) shall be composed of compact and contiguous territory as nearly "uniform" (for the Senate) and "square" (for the House) in shape "as possible".

B

We are persuaded that all the foregoing criteria, excepting only the 75-125% range of divergence for population, express rational and legitimate state policies which justify divergence from the federal goal of strict popula-

can be implemented consistently with the Equal Protection Clause.

Mahan v Howell holds that following county, township and city boundary lines is a valid justification for divergence from population equality.

Preservation of the integrity of "political subdivisions, insofar as possible" and the maintenance of "compact districts" were said, in Reynolds v Sims to be legitimate state goals.[15]

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[15]"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. (Emphasis supplied.) Reynolds v Sims, supra, 578-579.

While that statement was dictum, we conclude that, absent a different statement by the Court, achieving election districts which are as compact as possible is a legitimate state goal. Rectangularity, uniformity and squareness in shape express essentially the same concept and are thus also valid state goals.[16]

It is implicit in the decisions of the United States Supreme Court that a state may legitimately opt for contiguous rather than floterial districts.

C

An apportioning authority is justified in adopting only that degree of

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[16]This was the view of delegates to the Constitutional Convention. See 2 Official Record, Constitutional Convention 1961, pp 2111, 2112, 2151.

divergence from population equality essential to achieve the state goals. Once achieved, the flexibility is at an end. Accordingly, divergence from the federal goal of population equality is permitted only to the extent necessary to permit achievement of the state goals of observing the boundary lines of local units of government and compactness.

The range of divergence necessary to achieve the state goals shall be determined (i) separately for the state as a whole when apportioning senators and representatives to the counties, (ii) for each county, separately, when apportioning senators and representatives within a county, and (iii) for each city and township entitled to more than one senator or representative,

separately, when apportioning senators and representatives within a township or city.

We have considered the "range of allowable divergence" from the federal goal of population equality. Following the Mahan approval of a divergence of 16.4%, courts generally have concluded that 16.4% is the range of allowable divergence.[17]

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[17] In Mahan v Howell, supra, 338, the United States Supreme Court held that a 16.4% maximum deviation from exact population equality was justified because it was the result of "'legitimate considerations incident to the effectuation of a rational state policy'. Reynolds v Sims". The Court in Mahan said, "While this percentage may well approach tolerable limits, we do not believe it exceeds them." 410 US 329. The Supreme Court had previously invalidated a plan with a 26.48% deviation, regarding such a deviation to be intolerable. Kilgarlin v Hill, 386 US 120; 87 S Ct 820; 17 L Ed 2d 771 (1967).

Although the Supreme Court did not

hold in Mahan that 16.4% was the highest permissible deviation, state and lower federal courts have regarded that figure as the boundary. In Sims v Amos, 365 F Supp 215 (MD Ala, 1973), aff'd 415 US 902 (1974), the court rejected a plan with a 13.4% maximum deviation, because the population calculations were suspect and because the court did not believe the asserted interest in preserving precinct boundaries to be as significant a state interest as the preservation of county lines endorsed in Mahan. In dicta, the court construed Mahan to mean that no plan with a deviation greater than 16.4% could be justified. The California Supreme Court declared that "[a] maximum deviation greater than 16.4 percent is intolerable under the equal protection clause". Assembly of State of California v Deukmejian, – Cal 3d –, –; 180 Cal Rptr 297, 315; 639 P2d 939 (1982).

No court has approved a plan with deviations greater than 16.4%. In Cosney v Dalton, 522 F Supp 350 (ED Va, 1981), the court held intolerable a 22.13% deviation. See also Schrage v State Board of Elections, – Ill 2d –; 430 NE2d 483 (1981) (apparently adopting 1% as its limit); Clements v Valles, 620 SW2d 112 (Tex, 1981) (regarding the 9.9% deviation in a Texas reapportionment plan approved in White v Regester, 412 US 755; 93 S Ct 2332; 37 L Ed 2d 314 [1973], as the limit.)

D

Analysis of the structure of art 4, §§ 2-6 and of the record of the Constitutional Convention indicates that there is a hierarchy of the criteria:

(a) All districts are required to be

In Gaffney v Cummings, supra, the Court held a 7.83% deviation was de minimis, and did not have to be justified by adherence to a rational state policy. In the companion case of White v Regester, supra, the Court held a 9.9% deviation to be de minimis, in part because the average deviation was small. In Abate v Mundt, 403 US 182; 91 S Ct 1904; 29 L Ed 2d 399 (1971), the Court had required a deviation of 11.9% to be justified.

Lower courts have come to regard a 10% deviation as de minimis. Sims v Amos, supra (dictum); Assembly of State of California v Deukmejian, supra.

"[T]he fact that a 10% or 15% variation from the norm is approved in one state has little bearing on the validity of a similar variation in another state." Swann v Adams, 385 US 440, 445; 87 S Ct 569; 17 L Ed 2d 501 (1967).

single-member districts and contiguous; no land may be detached or isolated from the rest of the district except where necessary because of a body of water.

(b) The organizing principle of the apportionment process, both for the Senate and House, was county lines.[18]

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[18]Michigan's adherence to the principle that county and township lines should be preserved in the creation of election districts dates back to the formation of the Northwest Territory on July 13, 1787, and has been voiced in every Michigan constitution adopted since that date.

The Northwest Ordinance of 1787, § 9, in setting up a unicameral legislature, provided:

"So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly".

This preference was also voiced

in Michigan's first Constitution which set up a bicameral legislature. With respect to the House it was provided:

"The representatives shall be chosen annually on the first Monday of November, and on the following day, by the electors of the several counties or districts into which the State shall be divided for that purpose. Each organized county shall be entitled to at least one representative; but no county hereafter organized shall be entitled to a separate representative until it shall have attained a population equal to the ratio of representation hereafter established." Const 1835, art 4, § 4.

The provision respecting the Senate was even more explicit in its endorsement of the principle of county representation. It provided:

"The State shall be divided, at each new apportionment, into a number of not less than four nor more than eight senatorial districts, to be always composed of contiguous territory; so that each district shall elect an equal number of senators annually, as nearly as may be: and no county shall be divided in the formation of such districts." Const 1835, art 4, § 6.

The Constitution of 1850 was similar to the first constitution in its treatment of Senate representation. It provided:

"The Senate shall consist of

thirty-two members. Senators shall be elected for two years and by single districts. Such districts shall be numbered from one to thirty-two inclusive; each of which shall choose one senator. No county shall be divided in the formation of senate districts, except such county shall be equitably entitled to two or more senators." Const 1850, art 4, § 2.

The House provision, however, not only retained its emphasis on county representation but emphasized for the first time the desirability of respecting the sovereign integrity of city and township boundaries:

"Each representative district shall contain, as nearly as may be, an equal number of inhabitants * * * and shall consist of convenient and contiguous territory. But no township or city shall be divided in the formation of a representative district. When any township or city shall contain a population which entitles it to more than one representative, then such township or city shall elect by general ticket, the number of representatives to which it is entitled. Each county hereafter organized, with such territory as may be attached thereto, shall be entitled to a separate representative, when it has attained a population equal to a moiety of the ratio of representation." Const 1850, art 4, § 3.

Both the Constitution of 1908, which re-enacted the provisions of the

Senators and representatives were to be apportioned only to counties with

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1850 Constitution, and the subsequent amendment of these reapportionment provisions by the people in 1952, reaffirmed Michigan's commitment to the preservation of counties, townships, and cities as the basic units of electoral representation in the Legislature. As of 1962, the 1908 Constitution as amended read in pertinent part as follows:

"The Senate shall consist of 34 members. Senators shall be elected for 2 years and by single districts. Such districts shall be numbered from 1 to 34, inclusive, and shall consist of the territory within the boundary lines of the counties existing at the time of the adoption of this amendment * * *." Const 1908, art 5, § 2.

"The house of representatives shall consist of not more than 110 members. * * * Each county, or group of counties forming a representative district, shall be entitled to a separate representative when it has attained a population equal to 50 per cent of the ratio of representation * * *: Provided, That no township or city shall be divided in the formation of a representative district, except that when a city is composed of territory in more than 1 county, it may be divided at the county line or lines". Const 1908, art 5, § 3.

the result that county lines could never be broken.[19]

(c) In counties entitled to more than one senator or representative, the same principle that was adopted by the people for the allocation of senators and representatives among the counties was adopted for the allocation of senators and representatives within a county. It is stated first that the districts shall follow city or township boundary lines "to the extent possible" (for the Senate) and "where applicable" (for the House); and second, that senatorial districts shall be compact, contiguous and as nearly "uniform" in shape as possible and that representative districts shall be compact and contiguous and as nearly "square" in

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[19]See fn 3, supra, for the text

shape as possible.

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of art 4, §§ 2 and 3.

The overarching priority that the delegates to the constitutional convention attached to the preservation of county units, while discernable upon an examination of the final product of their deliberations, is underscored by statements made on the floor of the convention.

This commitment was stated in the majority report of the Committee on Legislative Organization, the committee responsible for drafting the reapportionment provisions of the 1963 Constitution. In speaking about the Senate plan, the majority report said,

"The plan * * * bases representation 80 per cent on population and 20 per cent on area. This is achieved by calculating the percentage of the state's population living in each county, multiplying the number by 4, and adding the percentage of the total area in the county to that figure. The resulting figure is the county's apportionment factor, and the county unit become the major building block in creating senate districts." 2 Official Record, Constitutional Convention 1961, p 2036.

Insofar as the House plan was concerned, the majority report said:

"All house districts will follow county boundary lines. This is recom-

mended in order to assure citizens clearly identifiable and traditionally recognized voting districts, and to conform to the long established county organization patterns of many groups, including the political parties. Many states follow county lines in districting, and the weight of testimony heard by the committee overwhelmingly favored continuing this practice in Michigan." 2 Official Record, p 2036

The paramount importance of the county line principle was also discussed at length by delegate Dehnke, himself a member of the Committee on Legislative Organization, when he took the floor to defend the majority report.

"Now it has been recognized—it became clear early in our proceedings before the committee—that the delegates from both sides were agreed that it would not be advisable to permit the cutting of counties in forming legislative districts in either house. Practical considerations convinced both groups that this would not be advisable and should not be done if it could possibly be avoided. Counties, of course, are not sovereign entities. I don't know of anyone who claimed that they were. But, historically, our counties have been formed for the convenience of the state, to facilitate the administration of government. They may be said to be the agents of the state, as a convenient unit for the administration of state laws and the maintenance of law and order; for judicial admini-

stration, for welfare administration, for keeping records of deeds, probates and so on. * * * Nothing is more proved, however, than that the integrity of the counties was considered of more importance than the equality of population." 2 Official Record, p 2099.

When comments such as these are taken into account, there can be little room to doubt that the integrity of county lines was a principle of prime importance to the framers of the 1963 Constitution.

The primacy under the 1963 Constitution of the county-line requirement is such that it takes precedence over the other criteria of preserving city and township lines (in those few instances where they cross county lines), compactness, uniformity and squareness.

Counties entitled to less than one senator or representative are required to be combined into election districts in accordance with the only criteria stated in §§ 2 and 3 for the organization of the less populous counties: (i) as to the Senate, compactness, convenience, contiguity, rectangularity and preservation of existing senatorial districts; and (ii) as to the House, compactness, convenience, and contiguity.

In the organization of these less populous counties, the first and controlling criterion is, again, that no county line shall be broken unless re-

While it is stated that the population of the district shall be as nearly equal as possible within a 75-125% range of divergence, that range

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quired in order to comply with the federal constitutional limitation regarding the range of allowable divergence. If without violating that limitation it were possible to organize the counties in more than one way, the controlling criteria, in order of importance, would be (i) observance of existing senatorial districts at the time of apportionment (it appears that preservation of existing senatorial districts was regarded as having a higher priority than compactness, see the comments of Professor James K. Pollock, a delegate to the Constitutional Convention, 2 Official Record, pp 2092-2093), and (ii) rectangularity:

(i) It may not be possible to observe existing senatorial districts because the invalidation of the weighted land area/population formulae may have so reduced the number of seats allocated to the less populous areas that this criterion cannot be implemented.

(ii) The terms, compactness, convenience, contiguity and rectangularity, appear to be complementary, expressive of the same concept. See fn 16.

was adopted so as to provide sufficient leeway to permit the organization of all election districts along city and township boundary lines, thereby indicating that the goal of following city and township boundary lines takes priority over the goal of population equality.[20]

The criteria that city and township

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[20]This rationale was stated by delegate W.F. Hanna, a member of the Committee on Legislative Organization, on the convention floor:

"[I]n our committee, those of us who worked diligently on attempting to draw maps, being as fair as we know how in counties like Wayne, Oakland, Muskegon, or any of them, whether you apply it to the senatorial districts or the house, if you wish to stay within city-township boundaries, we found that the 75-125 was a practical limitation, and this was substantiated by the testimony of election officials and other research. Now I submit to you that once you get them as nearly equal as possible you then only have to put a floor or a bottom before you start breaking city or township lines." 2

boundary lines be followed and that the districts be compact, uniform and square do not conflict. They are rather complementary, and reflect essentially the same concept. Cities are, in general, made up of all or parts of townships which are generally perfect squares. Many cities thus have a certain compactness and uniformity or squareness because they follow former

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Official Record, Constitutional Convention 1961, p 2115.

The provisions of the 1963 Constitution requiring that election districts be organized along county, city and township lines to the extent possible (i) enable voters living in a particular community to combine their votes more effectively to elect a representative from that area, (ii) facilitate the conduct of the election by reducing the number of precincts and special ballots, (iii) tend to preserve existing political party organizations, and (iv) limit the potential for gerrymandering.

township lines.[21] We are persuaded that following city and township lines takes precedence over compactness in the districting of counties entitled to more than one senator or representative.[22]

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[21]Noteworthy is that the requirement that city and township lines be followed is not qualified by "to the extent possible" in the rules for districting the House. The framers did not intend to provide a different guide for districting the House than the Senate. The "to the extent possible" was added for the more populous senate districts because it was less likely that this goal could be fully realized in districting the Senate. We read the omission of "to the extent possible" in House districting as indicative that a high degree of adherence to township and city lines was contemplated.

[22]We so conclude based on the language and structure of art 4, §§ 2 and 3, which first state the criterion of following city and township lines (and only qualify that criterion for the more populous senate districts with the words "to the extent possible"), and because that is what one of the members of the committee who drafted the language ultimately adopted said was meant:

"Mr. Yeager: * * * The language of the proposal specifically states that

(d) The only criteria stated for cities and townships entitled to more than one legislator are population equality, as nearly as possible within a range of 75-125% of the ideal, and compactness (uniformity or squareness) to "the extent possible".

The goals of population equality and compactness may be readily harmonized. The range of 75-125% was selected to facilitate drawing election district lines on city and township lines, not to facilitate greater compactness.

The goal of compactness seeks to avoid gerrymandering and is not an end

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the first consideration will be given to county and township lines. The second consideration is square in shape; not perfectly square, but square in shape." 2 Official Record, Constitutional Convention 1961, p 2150.

in itself. Districting solely to achieve population equality "may be little more than an open invitation to partisan gerrymandering". Reynolds v Sims, supra, 377 US 578. It is therefore necessary to limit the pursuit of the goal of equality of population to achieve the goal of compactness.

(e) An election district, circumscribed by a circle, containing the least land area (excluding land outside of this state or under the Great Lakes) outside of the district, is the most compact.

IV

At the outset of this opinion, we said that the questions of standards and severability are interrelated. Until we could describe the commission's function after Reynolds v Sims,

we could not decide whether the changes wrought by the United States Supreme Court have so changed the commission that it can no longer properly exercise the power delegated to it.

Having delineated the standards that govern, it is now necessary to stand back and look at the commission and ask ourselves whether this is the apportionment schema the people voted for?

A

A commission guided by standards clearly delineated in advance and which are enforced is a different body than a commission left to its own devices restrained only by federal constitutional requirements.

While the commission could be made to work and the Legislature could, in

the application of those rules, be redistricted and reapportioned, those rules necessarily operate differently than they would have if the weighted land area/population formulae were valid.

Persons living in less populous areas, who had a protected position under those formulae which assured a particular number of seats and an enlarged voice in the Legislature, no longer have that advantage. To be sure they were denied that advantage by the Reynolds decision, but Reynolds does not require that the remaining apportionment rules be applied without a return to the political process for a decision on how the Legislature shall be apportioned.

The parties have cited case law

concerning the severability of statutes, but art 4, §§ 2-6 is not a statute. This Court will not apply case law developed in the resolution of controversies concerning statutory invalidity where the issue presented concerns constitutional invalidity.

Nor is this a case of a single line item of the constitution being held violative of the federal constitution, for example, a provision of the finance article or one of the innumerable specific delegations of executive, legislative or judicial power.

The invalidity here declared goes to the heart of the political process in a constitutional democracy.

Constitutional democracies historically have not always been organized with separate but equal executive and

judicial branches. A constitutional democracy cannot exist, however, without a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed.

The issue here is power—political power—in a constitutional democracy. The Legislature has the ultimate authority to make the laws by which the people are governed. Any change in the means by which the members of the Legislature are chosen is a fundamental matter.

The United States Supreme Court has declared that some aspects of the method chosen by the people of Michigan are violative of the federal constitution. That Court having so declared, the question before us is what is the

responsibility of this Court.

No one can say whether the 1963 Constitution would have been adopted without an apportionment commission and the apportionment rules of art 4, §§ 2-6. Nor can anyone say whether the 1963 Constitution would have been adopted with the apportionment rules which result by reason of the partial invalidity under the federal constitution of the rules adopted.

Nor can anyone predict what the voters would do if presented with the severability question at a general election. Some voters might view with favor an apportionment commission that is governed by neutral principles, known in advance, and which redistricts and reapportions the state in a largely mechanical manner with little opportun-

ity for partisan maneuvering. In many states, the most egregious gerrymandering is practiced by the Legislature with the aid of computers to achieve results which will pass muster under federal standards yet favor the partisan interests of the dominant political faction.

The people may prefer to have the matter returned to the political process or they may prefer plans drawn pursuant to the guidelines which are delineated in this opinion.

It is not for this Court to speculate on a matter of such enormous importance. This is a decision which the people should make.

This Court's decisions in 1964 and 1972, reapportioning the Legislature by choosing a plan submitted by partisan

interests, have lent some legitimacy to an apportionment system of which the people have not wholly approved. If this Court does not invalidate the apportionment provisions of art 4, §§ 2-6, in their entirety,[23] many people may conclude that this Court, in simply making do with a doubtful situation, has lent its imprimatur to the bandaged formulae and that the burden is on those who would seek to have it changed.

The formulae which this Court has twice implemented are not what the people approved. What they approved they cannot have. And what they have, we cannot approve.

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[23]The provisions establishing number of senators and representatives, terms of office, and time of elections are not apportionment provisions and are severable.

The matter should be returned to the political process in a manner which highlights rather than hides the choices the people should make.

We have accordingly concluded that the apportionment provisions of art 4, §§ 2-6, cannot be maintained. When the weighted land area/population apportionment formulae fell, all the apportionment rules fell because they are inextricably related.

The commission cannot survive without apportionment rules. Article 4 provides only for apportionment according to rules stated in the Michigan Constitution. This Court, under article 4, can only order the commission to comply with Michigan constitutional standards. It has no basis for choosing between alternative plans without Michigan con-

stitutional standard that a computer cannot circumvent is unthinkable.

We conclude that the apportionment rules are not severable and that the commission therefore also is not severable.[24]

B

The power to redistrict and reapportion the Legislature remains with

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[24]A majority of the Court has rejected the contrary view that:

(a) The "constitutional requirements" concerning county, city and township lines, which preserve the autonomy of local government subdivisions, and compactness, designed to prevent gerrymandering, were not part of the political compromise reflected in the weighted land area/population formulae. They are separate requirements which carry forward provisions and concepts which extend back over 100 years from the Constitution of 1850 through the Constitution of 1908 and the 1952 amendment thereto. The invalidty of the weighted land area/population formulae under the United States Constitution does not affect the continuing viability of those separate requirements and they

the people. The people, however, can only exercise that power, as a practical matter, by amending the constitution, which, unless the Legislature proposes an amendment acceptable to the people, is a difficult and timecon-

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are accordingly severable.

(b) The severable constitutional requirements guide the commission in the performance of its duties and this Court in determining which plan most accurately, or whether a finally adopted plan, complies with the constitutional requirements. Neither elimination of land area as a factor in apportioning senators and representatives among the counties nor the application of the range of allowable divergence as a limitation in drawing election districts along county, city and township lines changes the commission's function or enlarges its discretion, nor does it affect this Court's function in deciding which plan most accurately, or whether a finally adopted plan, complies with the constitutional requirements. The provisions regarding the commission are accordingly severable and survive the invalidity of the weighted land area/population formulae.

suming process.[25] In the meantime, there must be a Legislature and federal constitutional requirements must be observed.

It is this Court's responsibility in deciding the severability question to consider and choose among the alternatives for the continuing governance of this state.

We recognize that the people cannot immediately indicate their preference. This Court must provide for the redistricting and apportionment of the Legislature in compliance with federal constitutional requirements and in a manner most consistent with the constitutional history of this state. The redistricting and apportionment plan re-

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[25]The initiative process is also difficult and time-consuming.

sulting from this Court's determination will stand until the people act, or it is changed by the collective action of the other two branches of this government, composed of persons who are the most immediate representatives of the people.

C

Apart from population and land area, we see in the constitutional history of this state dominant commitments to contiguous, single-member districts drawn along the boundary lines of local units of government which, within those limitations, are as compact as feasible.

We accordingly direct that election districts shall be drawn in accordance with the following criteria:

(a) Senate and House election dis-

trict lines shall preserve county lines with the least cost to the federal principle of equality of population between election districts consistent with the maximum preservation of county lines and without exceeding the range of allowable divergence under the federal constitution which, until the United States Supreme Court declares otherwise, shall be deemed to be 16.4% (91.8-108.2%).[26]

Where it is necessary to break

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[26]We do not read the decisions of the United States Supreme Court as imposing an absolute standard. Its opinions indicate rather that no hard and fast rule was laid down:

"[T]he fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." Swann v Adams, 385 US 440, 445 (1967).

county lines, because otherwise the range of allowable divergence would be exceeded, there shall be shifted the fewest cities or townships necessary to reduce the population divergence sufficiently to bring it within the range of allowable divergence.

Because of the narrowness of the range of allowable divergence, we anticipate that only one plan will organize the counties with the least breaking of county lines.

(b) After the county lines are drawn, the election district lines within those counties to which there is apportioned more than one senator or representative shall be drawn on city and township lines with the least cost to the federal principle of equality of population between election dis-

tricts consistent with the maximum preservation of city and township lines and without exceeding the range of allowable divergence.

Where it is necessary to break city or township lines, because otherwise the range of allowable divergence would be exceeded, there shall be shifted the number of people necessary to achieve population equality between the two election districts affected by the shift.

(c) Within a city or township to which there is apportioned more than one senator or representative, election district lines shall be drawn to achieve the maximum compactness possible within a population range of 98-102% of absolute equality between districts within that city or township.[27]

D

The Court appoints Bernard J. Apol, former director of elections, to supervise the drawing and submission to this Court for approval of a redistricting and apportionment plan in accordance with C above, with the assistance of the professional staff and facilities of the Secretary of State's office. Upon receipt of the plan, the Court will hold a public hearing before ordering it to be adopted.

E

The Legislature may, by a statute approved by the Governor with immediate effect at least four weeks preceding

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[27]We have considered the plans filed March 22, 1982, by members of the commission. The commission is no longer viable.

the filing date for nominating petitions for the August 1982 primary, redistrict and reapportion the Legislature in a manner consistent with federal and state constitutional requirements. Such a statutory redistricting and reapportionment plan shall supersede the plan directed to be drawn in accordance with C above.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

JUDGMENT ORDER

(March 25, 1982)

Order

Entered March 25, 1982

This matter having come to this Court, as provided in the 1963 Constitution, art 4, § 6, by advice from the secretary of the Commission on Legislative Apportionment that the commission could not agree upon a plan for districting and apportioning the Michigan Legislature and by the filing of such proposed plans by members of the commission, and argument having been heard on the issue of the constitutionality of Const 1963, art 4, §§ 2-6, it is hereby adjudged that the districting and apportionment provisions of art 4, §§ 2-6 are unconsti-

tutional and that the 38 senators and 110 representatives provided for in art 4, §§ 2 and 3 respectively, shall be elected from contiguous singlemember districts pursuant to districting and apportionment plans drawn as follows.

Bernard J. Apol, former Director of Elections is appointed to supervise the drawing and submission to this Court for approval of a legislative redistricting and apportionment plan in accordance with the instructions set forth in the Court's opinion in this matter. The Secretary of State shall provide all necessary technical services and facilities to accomplish this purpose.

Bernard J. Apol is instructed to communicate any questions concerning application of the criteria for re-

districting and apportionment, set forth in the Court's opinion in this matter, to the clerk of this Court. The Court will resolve such questions promptly, and if their resolution requires addition, amendment or modification of the criteria contained in this Court's opinion in this matter, such addition, amendment or modification will be announced by the issuance of a Court order.

Forthwith upon submission of the plan for this Court's approval the Secretary of State shall treat the plan as any ordinary public record and make its contents accessible to all persons who may be interested. To promote the prompt and orderly completion of the plan, until it is completed and so submitted all persons assisting in its

completion shall release information concerning it only to this Court or its clerk.

The Legislature may, by a statute which has immediate effect and is approved by the Governor on or before May 4, 1982, in order to preserve the established election schedule for this year, redistrict and reapportion the Legislature in a manner consistent with federal and state constitutional requirements. If such legislation is enacted, the Court will review it sua sponte forthwith and promptly announce, by order, whether it is consistent with federal and state constitutional requirements. If such legislation is found to be so consistent it will govern the legislative elections due this year and subsequently in ac-

cordance with the order to be issued by this Court. If no such legislation is enacted, the plan for legislative redistricting and apportionment drawn pursuant to this Court's order will govern the elections to be held this year. Before ordering into effect the plan drawn pursuant to this Court's order a public hearing will be held.

ORDER NOTICING HEARING ON MOTION FOR REHEARING

(April 30, 1982)

Order

Entered April 30, 1982

On order of the Court, a motion for rehearing is considered and, prior to decision on the motion, the Court will hear oral argument by the parties on the matter at 11 a.m. on Wednesday, May 5, 1982.

ORDER NOTICING PUBLIC HEARING ON PROPOSED PLAN

(April 30, 1982)

Order

Entered April 30, 1982

Redistricting and apportionment plans for both the Michigan Senate and House of Representatives having been submitted to this Court for approval by the Court's appointee, Bernard J. Apol, pursuant to this Court's opinion in this matter issued March 25, 1982, it is hereby ordered, also pursuant to provision in the said opinion, that a public hearing shall be held in the Supreme Court hearing room, Lansing, Michigan, commencing at 1 p.m. on Wednesday, May 5, 1982.

This hearing is limited to the

question: "Do the plans which have been submitted to the Court for approval by Bernard J. Apol adhere to the rules and standards set forth in the Court's opinion?"

All persons interested in addressing the Court on the question may address a written request for that purpose to the clerk of this Court. If it is not otherwise possible to accommodate all such requests, preference will be given to those who have given some indication in their requests of what the content of their presentation would be. It is suggested that all such requests contain a telephone number at which the clerk may contact a requestor and confirm whether that request for participation can be accommodated.

ORDER RESCHEDULING ELECTIONS

(May 13, 1982)

Order

Entered May 13, 1982

In this matter, the Court's opinion was issued and the judgment order thereon entered on March 25, 1982. The Court's judgment order provided, inter alia, that the Legislature could, by a statute with immediate effect which was approved by the Governor on or before May 4, 1982, redistrict and reapportion the Legislature in a manner consistent with federal and state constitutional requirements. No statute was enacted.

Now therefore, plans for the redistricting and reapportionment of the Michigan Legislature, drawn under the

supervision of Bernard J. Apol, former Director of Elections, having been submitted to the Court for approval on April 27, 1982, for the Senate and on April 29, 1982, for the House of Representatives, and a public hearing, open to all interested persons, having been held on May 5, 1982, on the question of whether said plans adhered to the rules and standards set forth in this Court's opinion, all as provided for in this Court's judgment order, this Court directed Bernard J. Apol to reconsider the plans submitted by him on April 27 and 29, particularly in light of the comments made at the public hearing on May 5, 1982, and the written materials submitted in lieu of or in support of oral presentations, and upon such reconsideration to recommend to

the Court any and all modifications to the plans submitted by him on April 27 and 29, which he considered would make the said plans more compliant with the rules and standards set forth in the Court's opinion.

Several modifications having been recommended by Bernard J. Apol and considered by the Court, he was directed to prepare them in proper form for inclusion by substitution in the plans submitted for approval on April 27 and 29. Having received those modifications in appropriate form on May 12, 1982, it is hereby further ordered (1) that the clerk of this Court shall treat those modifications as any ordinary public record, and make their contents accessible to any and all interested persons; (2) that any and all inter-

ested persons may file with the clerk, until 12 noon on May 19, 1982, written arguments (a signed original and 8 copies) attempting to show that the modifications should not be accepted on the ground that they do not cause the plans submitted on April 27 and 29 to be more compliant with the rules and standards set forth in this Court's opinion.

After considering all written submissions filed with the clerk pursuant to this order, and in all events by 12 noon on May 21, 1982, this Court will cause to be delivered to the office of the Secretary of State an order directing that he publish as provided by law, and hold the legislative elections for this year in accordance with, the plans submitted to this Court

by Bernard J. Apol on April 27 and 29, 1982, as amended by the modifications thereto submitted to this Court by him on May 12, 1982. If the Court is persuaded by submissions filed pursuant to this order that any of the modifications submitted to this Court by Bernard J. Apol on May 12, 1982, should not be implemented, the order to be issued by 12 noon on May 21, 1982, will so indicate.

It is further ordered: that the date for the filing of nominating petitions or payment of filing fees for the office of state senator and state representative, and for the filing of nominating petitions for the office of representative in congress, and for these offices only, shall be extended until June 15, 1982, at 4 p.m.;

That the Court of Appeals may, in such cases as it deems appropriate, extend the date for the filing of nominating petitions or payment of filing fees for the office of county commissioner until June 15, 1982, at 4 p.m.;

That the date for the filing of nominating petitions for the office of delegate to the county convention shall be extended until June 8, 1982, at 4 p.m.;

That the date for the withdrawal of a candidate who has filed nominating petitions or paid filing fees for an office to be nominated at the 1982 primary election shall be extended until June 18, 1982, at 4 p.m.;

That the primary election for the year 1982 only shall be held on August 10, 1982; that any reference to the

date of the primary election in nominating petitions heretofore or hereafter filed or circulated or in affidavits of identity or affidavits of candidacy heretofore or hereafter filed shall be construed to mean the primary election to be held August 10, 1982;

That the Secretary of State may authorize, upon written request by a city or township election commission, a division of a precinct which contains portions of more than one elective district for an office appearing on the ballot until May 28, 1982; that the chairman of a county political committee who has previously apportioned the number of delegates to the county convention for precincts as they existed on May 5, 1982, may make such changes as are necessary by the

division of precincts authorized in this order using the same formula that was used in the original apportionment, and that all changes shall be delivered to the county election commission by 4 p.m. on June 1, 1982;

That any person who has heretofore filed petitions containing the required number of signatures for election as delegate to the county convention from a precinct, and that precinct has been changed pursuant to this order shall be placed on the ballot as a candidate for precinct delegate to the county convention from the precinct in which he resides.

We retain jurisdiction.

Blair Moody, Jr., J., DISSENTS AND WILL SUPPLY A STATEMENT WITH THE FINA ORDER OF THE COURT.

ORDER DENYING MOTION FOR REHEARING

(May 21, 1982)

ORDER

Entered May 21, 1982

On order of the Court, motions by the Democratic members of the Commission on Legislative Apportionment for immediate consideration and for permission to submit their motion for rehearing in typewritten form are considered, and are hereby granted. The motion for rehearing filed by the Democratic members of the Commission on Legislative Apportionment is considered and is hereby denied. The motion by William Faust to intervene as to remedy, if the motion for rehearing were granted, becomes moot thereby and is denied.

CONCURRING OPINION, Justices Levin and Fitzgerald

(May 21, 1982)

Justices Levin and Fitzgerald fully concur and say:

On March 25, 1982, this Court held that the weighted land area/population formulae, invalidated by Reynolds v Sims, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964), and the remaining apportionment rules of Const 1963, art 4, §§ 2-6 were interdependent and not severable, and that the provisions establishing an apportionment commission and concerning its function and review by this Court were also not severable, and that, accordingly, the apportionment rules and the provisions respecting the apportionment commission cannot be maintained. Ante, pp 115, 138.

I

The opinion of the Court directed the drawing of election districts in a manner compliant with federal constitutional requirements consistent with the constitutional history of this state, and that the resulting redistricting and apportionment plan would stand until the Legislature and the Governor or the people provided by law an alternative plan. Ante, pp 116, 142.

On March 25, this Court entered a judgment order which, pursuant to the opinion, declared that the districting and apportionment provisions of Const 1963, art 4, §§ 2-6 had been adjudged to be unconstitutional, and that 38 senators and 110 representatives, provided for in art 4, §§ 2-3, shall be elected from contiguous, single-member

districts pursuant to districting and apportionment plans drawn as provided for in the opinion of the Court and that order.[1]

The opinion and order appointed Bernard J. Apol to supervise the drawing and submission to this Court for approval of a legislative redistricting and apportionment plan in accordance with the instructions set forth in the Court's opinion.

The opinion directed that the election districts be drawn in accordance with the following criteria:

> "(a) Senate and house election district lines shall preserve county lines with the least cost to the federal principle of equality of population between election districts consistent with the maximum preservation of county lines and without exceeding the range of allowable divergence

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[1]Ante, p 143.

under the federal constitution which, until the United States Supreme Court declares otherwise, shall be deemed to be 16.4% (91.8%-108.2%).

"Where it is necessary to break county lines, because otherwise the range of allowable divergence would be exceeded, there shall be shifted the fewest cities or[2] townships necessary to reduce the population divergence sufficiently to bring it within the range of allowable divergence.

"Because of the narrowness of the range of allowable divergence, we anticipate that only one plan will organize the counties with the least breaking of county lines.

"(b) After the county lines are drawn, the election district lines within those counties to which there is apportioned more than one senator or representative shall be drawn on city and township lines with the least cost to the federal principle of equality of population between election districts consistent with the maximum preservation of city and

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[2]The words "cities or" were not in the opinion as originally filed; this and other oversights were discovered within a few days of the filing of the opinion on March 25 and the Court directed the Reporter of Decisions to add those words and to make other corrections in the opinion.

township lines and without exceeding the range of allowable divergence.

"Where it is necessary to break city or township lines, because otherwise the range of allowable divergence would be exceeded, there shall be shifted the number of people necessary to achieve population equality between the two election districts affected by the shift.

"(c) Within a city or township to which there is apportioned more than one senator or representative, election district lines shall be drawn to achieve the maximum compactness possible within a population range of 98%-102% of absolute equality between districts within that city or township."[3]

The order provided that Mr. Apol shall communicate "any questions concerning application of the criteria for redistricting and apportionment, set forth in the Court's opinion in this matter, to the clerk of this Court. The Court will resolve such questions promptly, and if their resolution re-

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[3]Ante, p 141.

quires addition, amendment or modification of the criteria contained in this Court's opinion in this matter, such addition, amendment or modification will be announced by the issuance of a Court order."[4]

The opinion also provided that the "Legislature may, by a statute approved by the Governor with immediate effect at least four weeks preceding the filing date for nominating petitions for the August 1982 primary, redistrict and reapportion the Legislature in a manner consistent with federal and state constitutional requirements. Such a statutory redistricting and reapportionment plan shall supersede the plan directed to be drawn in accordance

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[4]Ante, p 143.

with" the criteria (a)-(c) set forth in the opinion of the Court quoted above.[5]

The order elaborated on the opinion and stated:

> "The Legislature may, by a statute which has immediate effect and is approved by the Governor on or before May 4, 1982, in order to preserve the established election schedule for this year, redistrict and reapportion the Legislature in a manner consistent with federal and state constitutional requirements. If such legislation is enacted the Court will review it sua sponte forthwith and promptly announce, by order, whether it is consistent with federal and state constitutional requirements. If such legislation is found to be so consistent it will govern the legislative elections due this year and subsequently in accordance with the order to be issued by this Court. If no such legislation is enacted, the plan for legislative redistricting and apportionment drawn pursuant to this Court's order will govern the elections to be held this year. Before ordering into effect the plan

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[5]Ante, p 142.

drawn pursuant to this Court's order a public hearing will be held."[6]

A

On April 14, 1982 the Democratic members of the apportionment commission filed a motion for rehearing, stating that this Court had found the apportionment provisions of Michigan's 1963 Constitution to be unconstitutional "and then reimposed much the same provisions on its own agent Bernard Apol", and that the Court had done so "(1) without affording the parties due process of input on what remedial standards, if any, would apply if the state constitutional provisions were stricken; (2) based on a misconception of Michigan 'constitutional history'; and (3) in

violation of post-Mahan v Howell United States Supreme Court authority, which rejected for court-ordered legislative reapportionment plans such mechanistic applications of Mahan." (Emphasis in original.)

On May 5, 1982, the Republican members of the apportionment commission filed a written response to the motion for rehearing stating that due process and an opportunity to be heard had been provided, that the criteria set forth in the opinion of the Court do conform to the constitutional history of this state, and that the Court's decision is not violative of post-Mahan decisions of the United States Supreme Court.

B

Pursuant to the opinion of the Court, Mr. Apol communicated to the Court questions concerning the application of the Criteria for redistricting and apportionment. The clerk of the Court communicated with Mr. Apol; Mr. Apol met with the Court in conference and submitted progress reports.

The Court responded to Mr. Apol's inquiries, reiterating criteria set forth in the opinion and expanding on such criteria as follows:

1. The Senate consists of 38 districts.

2. The House consists of 110 districts.

3. All districts shall be contiguous, single-member districts.

4. The districts shall have a population not exceeding 108.2% and not less than 91.8% of the ideal district which, based on the 1980 census, would contain 243,739 persons in the Senate and 84,201 persons in the House.

5. The boundaries of the districts shall first be drawn to contain only whole counties to the extent this can be done within the 16.4% range of divergence and to minimize within that range the number of county lines which are broken.[7]

6. If a county line is broken, the fewest cities or townships necessary to reduce the divergence to within

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[7]There is a subsidiary rule that if one part of a county is shifted to one district and all the rest of the county is shifted to another district that counts as one break.

16.4% shall be shifted; between two cities or townships, both of which will bring the district within the range, the city or township with the least population shall be shifted.[8]

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[8]Where county lines must be broken, whole cities or townships must be shifted in order to avoid breaking city and township lines.

The Court considered whether, when cities or townships must be shifted, there should be shifted (i) the number of cities or townships necessary to equalize the population of the two districts, or (ii) only the number of cities or townships necessary to bring the districts within the range of allowable divergence. The Court concluded that the concept of minimizing the breaking of county lines extended to the shifting of cities and townships. A county is kept more intact as a community of interest, and fewer special election districts must be created, when the minimum necessary number of cities or townships are shifted.

There remained the possibility that two sets of cities or townships might satisfy the above rule; for example, each of two townships might contain

7. Between two plans with the same number of county line breaks, the one that shifts the fewest cities and townships statewide shall be selected; if more than one plan shifts the same number of cities and townships statewide, the plan that shifts the fewest people in the aggregate statewide to election districts that break county lines shall be selected.

8. In a county which has more than one senator or representative, the boundaries of the districts shall first be drawn to contain only whole cities and townships to the extent this can

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the population required to be shifted. The Court again concluded that the concept of preserving counties as communities of interest to the fullest extent possible required that the township or set of townships with the fewest people necessary should be shifted.

be done within the 16.4% range of divergence and to minimize within that range the number of city and township lines which are broken.

9. If a city or township line is broken, there shall be shifted the number of people necessary to achieve population equality between the two election districts affected by the shift,[9] except that in lieu of absolute equality the lines may be drawn along the closest street or comparable boundary; between alternative plans, shifting the necessary number of people, the plan which is more compact is to be selected.

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[9]This rule is somewhat inconsistent with the rule applied to county line breaks. That inconsistency simply reflects one of the compromises inherent in a unanimous opinion.

10. Between two plans, both of which have the same number of city and township breaks within a particular county, the one which minimizes the population divergence in districts across the county is to be selected.

11. Within a city or township which is apportioned more than one senator or representative, election district lines shall be drawn to achieve the maximum compactness possible within a population range of 98%-102% of absolute equality between districts within that city or township.

12. Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside

the district. The plan to be selected is the plan with the least area within all the circles not within the district circumscribed by the circle.

C

On April 29, 1982, the Court received a House plan from Mr. Apol; it had received a Senate plan on April 27. Both plans, and Mr. Apol's covering memoranda of April 27 and April 29, were released to the public on April 29.

On April 30, the Court entered two separate orders directing that hearings be held on May 5, 1982:

—a hearing in the morning on the subject matter of the motion for rehearing which had been filed by the Democratic members of the apportionment commission,[10] and

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[10] Ante, p 145.

—a public hearing in the afternoon on the question whether the plans submitted by Mr. Apol adhered to the rules and standards set forth in the Court's opinion."[11]

Bills had been introduced in the Legislature providing for redistricting and reapportionment, but the Legislature adjourned on May 4 without agreeing on a bill.[12]

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[11] Ante, p 145.

[12] A bill had passed the House on May 4 providing for the redistricting and reapportionment of the House which had been transmitted to the Senate. This bill did not contain provisions concerning the redistricting and reapportionment of the Senate. Later in the day, the Senate added senatorial redistricting and apportionment provisions. The bill was returned to the House on May 5. No further action was taken on the bill, and no bill was submitted to the Governor.

Neither the House nor the Senate plan was passed with a majority suf-

At the May 5 hearing, on the motion for rehearing, counsel for the Democratic members of the Commission on Legislative Apportionment argued that the criteria set forth in the opinion of the Court for the redistricting and apportionment of Senate and House were erroneous.[13] Counsel for the Republican members argued that the criteria were valid.

At the afternoon public hearing on May 5, the following persons ap-

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ficient for immediate effect (Const 1963, art 4, § 27).

[13]The motion for rehearing sought, among other relief, to have the Court "vacate its decision". At the hearing, the lawyer for the Democratic members said that his objections went to the criteria and that he was not asking the Court to reconsider its decision holding that the apportionment provisions and the provisions concerning the apportionment commission could no longer be maintained.

peared: Speaker Bobby Crim,[14] Jerold E. Lax, a lawyer representing the majority caucus of the Senate;[15] Senator William Faust, senate majority leader;[16] Senator Basil W. Brown;[17] A. Robert Kleiner, a Democratic member of the Commission on Legislative Apportion-

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[14]Speaker Crim urged the Court to adopt for the House of Representatives the redistricting and reapportionment plan which a majority of the House had adopted on May 4, 1982.

[15]Mr. Lax contended that the Apol plan does not comply with the criteria set forth in the opinion.

[16]Senator Faust said that the release of the Apol plan on April 29 made it impossible to reach a bipartisan agreement in the Senate because, compared to the 1972 apportionment plan pursuant to which the present members of the Senate had been elected, the Apol plan gave an advantage to the Republicans and there was, in consequence, insufficient incentive for Republican senators to negotiate with Democratic senators.

He urged the Court to find a method by which the matter could be

tive Ethel Terrell;[21] Senator Robert Vanderlaan, senate minority leader;[22] Representative William R. Bryant, Jr.,

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[21]Representative Terrell urged the adoption of the Apol plan and expressed opposition to what she characterized as the House incumbents' plan—the plan which had passed the House on May 4—because that plan would divide the City of Highland Park, part of her district, into two districts.

[22]Senator Vanderlaan said that the Senate and House had failed to adopt a plan, contended that the bills had not been voted upon in accordance with the requirements of Const 1963, art 4, § 26, and asserted that the plan offered by the senate majority was not a "bi-partisan plan" and that it was unacceptable to the Republican minority. He expressed approval of the criteria set forth in the opinion of the Court, stating "that breaking as few county and municipal boundaries as possible is sound constitutional practice". He stated that the plans that had been offered in the House and Senate were incumbents' plans, that preservation of incumbency was not a proper concern and that he was "reasonably sure that the Senate will not reach a compromise on a Senate plan" and urged adoption of the Apol plan.

ment;[18] Robert L. Henry, a lawyer representing the Republican members of the Commission on Legislative Apportionment;[19] Thomas F. Weider, who said he was representing himself;[20] Representa-

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returned to the Senate under circumstances "not having an advantage to one political party or any spelled out by this body to the people of the Senate. I think that in that give and take arena, in my judgment, if the Apol plan had not been made public we would have reached a bipartisan agreement. And we would have had today, a bill on the Governor's desk for signature."

[17]Senator Brown said that as a result of the Apol plan, 85%-90% of the Senate district in which he lives will be new territory, and urged the Court to provide additional time for the Legislature to agree on a plan.

[18]Mr. Kleiner contended that the Apol plan does not comply with the criteria of the opinion.

[19]Mr. Henry contended that the Apol plan does comply with the criteria of the opinion.

[20]Mr. Weider contended that the Apol plan does not comply with the criteria of the opinion.

house minority leader;[23] Representative James E. Defebaugh;[24] Representative Debbie Stabenow.[25]

The Court received written submissions from Speaker Crim, Senator Faust, Representative Stabenow, Mr. Kleiner, Mr. Weider, and a number of members of the Legislature who did not speak at the public hearing.

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[23]Representative Bryant said that although he had voted on May 4 for the plan which had passed the House, his vote was on the understanding that House minority support was subject to there being a Senate plan acceptable to the Senate minority, and that not having been achieved the House plan was not acceptable to the House minority.

[24]Representative Defebaugh, a Republican member, said that he supports the criteria and the Apol plan.

[25]Representative Stabenow expressed support for the plan which had passed the House and opposition to the Apol plan because, in her view, it would affect adversely incumbent women representatives.

D

The Court engaged Ketron, Inc., to prepare computer-based districting plans. The Court received from Ketron preliminary plans for the Senate and the House.

It appeared on comparison of the Apol and Ketron plans that the Apol plan was in some particulars more compliant with the criteria than the Ketron plan, while the Ketron plan was more compliant in other particulars.

The Court resolved that the provisions and features which were most compliant with the criteria, whether set forth in the Apol or the Ketron plan, should be adopted.

The Apol and Ketron plans were prepared independently.[26] The Ketron plan was prepared mathematically by

technicians located in another state who are unfamiliar with either the geography or the political history of this state and provides a measure of protection against the injection, however unintentionally, of subjective judgments by persons who have such knowledge. Having the plans prepared by two separate groups provides further assurance that the district lines will be more compliant with the criteria in light of the tight time span in which Mr. Apol and Ketron have been working.

Mr. Apol and Ketron have cautioned that plans complying more exactingly with the criteria no doubt could be prepared if more time were available.

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[26]Ketron, Inc., was supplied with a preliminary Senate plan which had been prepared by Mr. Apol before the contract with Ketron was entered into.

E

On May 13, 1982, the Court promulgated a revised Apol plan and stated that after the May 5, 1982, hearing the Court had

> "directed Bernard J. Apol to reconsider the plans submitted by him on April 27 and 29, particularly in light of the comments made at the public hearing on May 5, 1982, and the written materials submitted in lieu of or in support of oral presentations, and upon such reconsideration to recommend to the Court any and all modifications to the plans submitted by him on April 27 and 29, which he considered would make the said plans more compliant with the rules and standards set forth in the Court's opinion."

Mr. Apol incorporated into the revised plan modifications based on improvements which appeared upon examination of the Ketron plan, communications from Messrs. Kleiner and Weider and others, and improvements discovered on more complete examination by Mr. Apol

and his staff. The May 13 order further stated:

> "Several modifications having been recommended by Bernard J. Apol and considered by the Court, he was directed to prepare them in proper form for inclusion by substitution in the plans submitted for approval on April 27 and 29. Having received those modifications in appropriate form on May 12, 1982, it is hereby further ordered (1) that the clerk of this Court shall treat those modifications as any ordinary public record, and make their contents accessible to any and all interested persons; (2) that any and all interested persons may file with the clerk, until 12 noon on May 19, 1982, written arguments (a signed original and 8 copies) attempting to show that the modifications should not be accepted on the ground that they do not cause the plans submitted on April 27 and 29 to be more compliant with the rules and standards set forth in this Court's opinion."

The Court received on May 19 written communications from various persons which were considered by the Court in conference on May 20.

The May 13 order further provided:

"After considering all written submissions filed with the clerk pursuant to this order, and in all events by 12 noon on May 21, 1982, this Court will cause to be delivered to the office of the Secretary of State an order directing that he publish as provided by law, and hold the legislative elections for this year in accordance with, the plans submitted to this Court by Bernard J. Apol on April 27 and 29, 1982, as amended by the modifications thereto submitted to this Court by him on May 12, 1982. If the Court is persuaded by submissions filed pursuant to this order that any of the modifications submitted to this Court by Bernard J. Apol on May 12, 1982, should not be implemented, the order to be issued by 12 noon on May 21, 1982, will so indicate.[27]

Pursuant to the foregoing paragraph of the May 13 order the Court has today entered an order directing the Secretary of State to publish and to hold the legislative elections for this year in accordance with the redis-

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[27] Ante, P 147.

tricting and reapportionment plans thereby approved and described in the next paragraph:

"The plans approved are:

"1. The plans submitted to this Court for approval by Bernard J. Apol; for the Senate under the date of April 27, 1982, and for the House of Representatives under date of April 29, 1982;

"2. Substituting for the provisions of parts of the said plans dated April 27 and 29, the superseding provisions of the modifications dated and submitted by Bernard J. Apol for Court approval on May 12, 1982."

Today's order continues:

"The Court retains jurisdiction for the purpose of taking such affirmative action as may be necessary to insure an orderly election in 1982 pursuant to a constitutionally valid plan."[28]

The May 13 order further provided for an extension until June 15 of the time for filing nominating petitions

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[28] Post, p 213.

or payment of filing fees for the offices of state senator, state representative and representative in Congress and changed the date of the primary election for the year 1982 only from August 3 to August 10, 1982.

F

The populations of the counties are such that there cannot be less than three county line breaks in the Senate and eight in the House.

The revised Apol plan, released May 13 and today adopted, has the county, city and township line breaks set forth in Appendix A.

A list of the senate and house election districts by population and the variances is set forth in Appendix B. In the Senate, the maximum deviation is in a district 8.13% overrepresented

and in a district 8.11% underrepresented for a total maximum deviation of 16.24%. In the House, the maximum deviation is in a district 8.19% overrepresented and in a district 8.15% underrepresented for a total maximum deviation of 16.34%.

II

The March 25, 1982, opinion of the Court declared that "[t]his Court must provide for the redistricting and apportionment of the Legislature in compliance with federal constitutional requirements and in a manner most consistent with the constitutional history of this state". The Court said that it saw "in the constitutional history of this state dominant commitments to contiguous, single-member districts drawn along the boundary lines of local units

of government which, within those limitations, are as compact as feasible."[29]

In directing that election district lines be drawn to preserve county, city and township lines within a maximum 16.4% range of divergence, the Court relied on the decision of the United States Supreme Court in Mahan v Howell, 410 US 315; 93 S Ct 979; 35 L Ed 2d 320 (1973), where that Court had upheld a state legislative apportionment plan which, with a maximum percentage deviation of 16.4%, had departed from the goal of population equality in order to achieve what the Court said was the rational, legitimate state goal of preserving the integrity of political subdivisions of the state.

The motion for rehearing filed by

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[29] Ante, p 140.

the Democratic members of the Commission on Legislative Apportionment asserts that this Court's reliance on Mahan v Howell is misplaced because in subsequent decisions, Chapman v Meier, 420 US 1; 95 S Ct 751; 42 L Ed 2d 766 (1975), and Connor v Finch, 431 US 407; 97 S Ct 1828; 52 L Ed 2d 465 (1977), the United States Supreme Court had limited Mahan to apportionment plans adopted by a state legislature and imposed higher and more restrictive standards for "court-ordered" plans. It is asserted that the Apol plan is a court-ordered plan subject to the Chapman/Connor rule.

The motion for rehearing was filed before the Apol plan was released on April 29. During the May 5 oral argument on the motion for rehearing,

counsel for the Democratic members of the Commission on Legislative Apportionment argued that Mahan is also distinguishable on the ground that the average percentage deviation under the Mahan plan was ±3.89% while the average percentage deviation under the Apol plan when so released was ±5.20%.[30]

Counsel could not have been expected to have presented, before the March 25 opinion was released, the arguments concerning the applicability of Mahan made in the motion for rehearing and at the oral argument. The arguments require, in our opinion, a response in opinion form.[31]

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[30]No brief expanding on the motion for rehearing was filed after oral argument was ordered.

[31]The judgment of this Court is subject to review by the United States

III

It is contended that Chapman and Connor stand for the proposition that all "court-ordered" reapportionment plans are constitutionally suspect if they produce substantial deviations from population equality absent compelling justification. This reading focuses on the phrase "court-ordered" plan and goes on to assume that all plans drawn by criteria defined (ordered) by a "court" or by a person or

Supreme Court and may also be subject to collateral attack (28 USC § 2284[a]) if an action can be maintained in the federal courts following an adjudication of federal constitutional issues in this Court. See fn 55. In all events, an explanation of the basis upon which this Court rejected and adjudicated adversely to the contentions of those who object to the Apol plan their federal constitutional claims should, in our opinion, accompany the Court's order denying the petition for rehearing and promulgating the Apol plan.

body designated by a court automatically come within the Chapman/-Connor rule.

Such an assumption fails to take into account the source of the "court-ordered" plan doctrine and the factual context of Chapman and Connor. When these factors are introduced into the analysis, it appears that Chapman and Connor do not hold that all plans ordered by a court, regardless of source, must ordinarily approximate population equality, but rather stand for a narrower set of propositions.

The higher standards announced in Chapman and Connor apply to plans ordered by federal courts to remedy a failure of a state to reapportion in compliance with the requirements of the Fourteenth Amendment. The higher stan-

dards do not apply to a "state-ordered" plan promulgated by state authority pursuant to, or to bring about compliance with, state law. The rule of Mahan applies unmodified by Chapman or Connor to an apportionment plan ordered by a state court to effectuate compliance with state law as well as to a plan adopted by a state legislature or by a state apportionment board or commission.

A

When a federal court apportions a state legislature, there is a risk that legitimate state policies will be ignored or misunderstood. To limit encroachment by the federal judiciary on state sovereignty, the United States Supreme Court limited the discretion of the federal courts by requiring greater population equality in federal

court-ordered plans. This concern is not present where the court ordering the plan is not a federal court but a state court which has declared and acts to enforce state policy.

The language and reasoning of the Court in Chapman indicate that by "court-ordered" plan, the United States Supreme Court means a plan devised by a federal court to implement the requirements of the Fourteenth Amendment where, because there is not state policy, the federal court would have discretion.

As the Court explained in Chapman, p 19, "[w]hen the plan is court ordered, there often is no state policy". "Absent particularly pressing features calling for multi-member districts, a United States district court should re-

frain from imposing them upon a State". (Emphasis supplied.) Chapman, by imposing higher standards on a United States district court when it is devising a remedial plan, with a view to confining the discretion of the federal courts where such discretion is not limited by state policy, does not limit the power of a state court to define state policy any more than it limits the power of a legislature or of a state apportionment board or commission to define state policy.

In Connor the United States Supreme Court reasoned that federal court-ordered plans were subject to more rigid standards of scrutiny because the federal courts do not have the authority to resolve sensitive questions of state policy:

> "These high standards reflect the unusual position of federal courts as draftsmen of reapportionment plans. We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination,' Reynolds v Sims, 377 US 533, 586; 84 S Ct 1362; 12 L Ed 2d 506 (1964), for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." Connor, 414-415.

In Connor, the Court considered whether there was sufficient justification for a plan drawn by a United States district court which assertedly had been drawn along the boundary lines of local political subdivisions. The Court ruled that the plan was, on two bases, defective. "The district court failed here to identify any such